

**Appeal No. 2011AP2166**

**Cir. Ct. No. 2010PA42PJ**

**WISCONSIN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE PATERNITY OF F. T. R.:**

**DAVID J. ROSECKY,**

**PETITIONER-APPELLANT,**

**V.**

**MONICA M. SCHISSEL,**

**RESPONDENT-RESPONDENT.**

**FILED**

**AUG 9, 2012**

Diane M. Fremgen  
Clerk of Supreme Court

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Lundsten, P.J., Sherman and Blanchard, JJ.

We certify this appeal to the Wisconsin Supreme Court to decide the issue of whether an agreement for the traditional surrogacy and adoption of a child is enforceable.

**BACKGROUND**

Monica and Cory Schissel and Marcia and David Rosecky were longtime friends who entered into an agreement for a traditional surrogacy<sup>1</sup> and

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<sup>1</sup> As explained in Monica's brief, a "traditional surrogacy" involves an embryo conceived via artificial insemination, using a surrogate's own egg and a man's sperm. In contrast, a "gestational surrogacy" involves implanting the surrogate with an embryo created by *in vitro* fertilization using another woman's egg and a man's sperm.

adoption of the child. The parties agreed, first verbally and then in writing through a written “parentage agreement,” that Monica Schissel would carry a child for the Roseckys, who would raise the child to adulthood. Each couple was represented by separate counsel in executing the parentage agreement. The agreement specified that, after birth, the Roseckys would have physical placement and custody of the child, and that Monica and Cory would not have any rights to custody or placement of the child. The agreement further provided that Monica would cooperate with any proceedings for the termination of her parental rights and adoption of the child by the Roseckys.

As contemplated in the agreement, Monica became pregnant by artificial insemination, using her egg and David’s sperm. However, before the child was born, Monica informed the Roseckys that she was not willing to terminate her parental rights. After the birth of the child, David Rosecky filed a motion in circuit court seeking specific performance of the parentage agreement. In a decision and order entered February 8, 2011, the circuit court denied the motion for specific performance and found that the parentage agreement was null and void because it did not meet the requirements for voluntary termination of parental rights under WIS. STAT. ch. 48. The parties stipulated to an interim placement order that allowed Monica three hours of visitation with the child every other week.

A trial was held to determine the child’s best interests relative to custody and physical placement under WIS. STAT. § 767.41. In a decision and order dated August 25, 2011, the circuit court awarded sole custody and primary placement of the child to David Rosecky. The court awarded secondary placement to Monica Schissel, under terms that allow her six hours of placement every other weekend until the child reaches two years of age, after which point

Monica will have overnight placement every other weekend. David Rosecky appeals.

### **ISSUES ON APPEAL**

David argues on appeal that the parentage agreement should be enforced. Wisconsin currently does not have legislative or common law that addresses the enforceability of a surrogacy agreement. David also argues, as does the child's guardian ad litem, that the circuit court's order allowing secondary placement of the child with Monica Schissel is not supported by the evidence.

#### *Enforceability of the Parentage Agreement*

David argues that the parentage agreement should be enforced and that the terms of the contract are consistent with WIS. STAT. ch. 48. He further argues that the agreement can be enforced without requiring Monica to terminate her parental rights. He asserts that a severability clause within the agreement allows the court to enforce other valid provisions of the contract and carry out the parties' intent, even if the court deems other provisions invalid.

David also asserts that the doctrine of equitable estoppel demands enforcement of the contract. *See Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 291 Wis. 2d 259, 275, 715 N.W.2d 620 (2006) (stating the elements of equitable estoppel). He asserts that Monica made both verbal and written promises to the Roseckys that she would serve as their surrogate. David argues that Monica knew the Roseckys would rely upon her promises and, with that knowledge, she became inseminated with David's sperm, became pregnant, and accepted payments from the Roseckys. He argues that it was reasonable for the Roseckys to rely upon Monica's promises, due to their contractual relationship and

close personal friendship with her and her husband, and that the doctrine of equitable estoppel prohibits Monica from repudiating the parentage agreement.

In further support of his argument, David cites authority from other jurisdictions that have upheld agreements in the surrogacy context. *See, e.g., Doe v. Roe*, 717 A.2d 706 (Conn. 1998) (court approved an adoption agreement which called for the surrogate to consent to the termination of her parental rights); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (court declared the intended parents to a gestational surrogacy agreement the natural and legal parents).

Monica argues that the parentage agreement should not be enforced, for a variety of reasons. She asserts that it contains payment provisions that do not comport with WIS. STAT. § 48.913(1)(f), which limits payments to mothers in anticipation of adoption. She also argues that the agreement illegally attempts to create parental rights by contract, and runs contrary to WIS. STAT. chs. 48 and 767.

Monica's brief provides a summary of the status of surrogacy law in other states. She asserts that thirty-one states, including Wisconsin, do not have laws either allowing or prohibiting surrogacy agreements. She contends that eight states—Arizona, Indiana, Michigan, Nebraska, New York, North Dakota, Tennessee, and the District of Columbia—have general prohibitions on surrogacy and/or surrogacy agreements. *See, e.g.,* ARIZ. REV. STAT. § 25-218, IND. CODE § 31-20-1-1, TENN. CODE ANN. § 36-1-102(48)(c). *See also McDonald v. McDonald*, 196 A.D.2d 7, 9 (N.Y. App. Div. 1994). Monica further asserts that seven states—Florida, Illinois, Massachusetts, Nevada, New Jersey, Texas, and Utah—have either statutory or case law that permits only gestational surrogacy. *See, e.g.,* FLA. STAT. § 742.15, 750 ILL. COMP. STAT. 47/10, NEV. REV. STAT. 126.045. *See also R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998); *Matter of Baby M*,

537 A.2d 1227 (N.J. 1988). Monica further asserts that other states allow surrogacy agreements only if they are judicially preapproved or comply with other protective measures. *See* N.H. REV. STAT. ANN. §§ 168-B:1-B:32. *See, e.g.,* VA. CODE ANN. § 20-156 and § 20-161(B).

Monica argues that the question of whether a surrogacy agreement should be enforced in Wisconsin is a question that the legislature has not answered in the affirmative. She argues, therefore, that the circuit court properly concluded that the parentage agreement was unenforceable under the current, relevant statutory scheme.

The guardian ad litem declines to take a position on the enforceability of the parentage agreement in her brief.

*Sufficiency of the Evidence to Support the Circuit Court's Order*

Both David and the child's guardian ad litem argue that the court's placement order is not in the child's best interest and does not take into consideration all of the relevant statutory factors for custody and physical placement enumerated in WIS. STAT. § 767.41(5)(am). They also argue that the circuit court erroneously exercised its discretion by disregarding expert testimony regarding the emotional and psychological consequences to the child as a result of contact with Monica. Monica argues that the placement order should be upheld because the circuit court properly exercised its discretion in weighing the expert testimony in this case and in weighing the relevant statutory factors in § 767.41(5)(am).

If the supreme court affirms the circuit court with respect to the non-enforceability of the parentage agreement, then it will reach the issue of whether

the circuit court's placement order is supported by the evidence and reflects a proper exercise of discretion. The resolution of the placement issue appears to involve the application of settled principles to the particular facts here.

#### **BASIS FOR THE CERTIFICATION**

Whether a surrogacy agreement should be enforced is a question that is likely to reoccur and involves policy determinations of statewide importance that are most appropriately decided by the supreme court. Therefore, we respectfully request that the Wisconsin Supreme Court grant certification of this appeal.

